INDEX

	Page
Statement of Facts	1
Summary of the Mexican Revolution	3
The Question of Jurisdiction	4

CITATIONS

	Pages
American Banana Co. v. United Fruit Co., 213 U. S., 347, 355-6; 53 L. Ed., 826	7
Berg v. British & African Steam Nav. Co., U. S. Supreme Court Advance Opinions, 1916, No. 11, May 1st, 1917, page 337 at page 343	10, 11
Collins v. Steamer Florida, 101 U. S., 37; 25 L. Ed., 898	10, 11
Gladstone v. Ottoman Bank, 1 Hemming & Miller, 505, 509-13; 9 Jur. N. S., 246; 32 N. J. Ch., 228; 8 L. T. Rep. N. S., 162; 1 New Rep., 512; 11 Wkly. Rep., 460	8
Jones v. United States, 137 U. S., 302; 34 L. Ed., 691	4
L'Amistad de Rues, 5 Wheat., 385, 390-2; 5 L. Ed., 115, 116-17,	10, 11, 13
L'Invincible, 1 Wheat., 238, 250-6, 254, 256, 258; 4 L. Ed., 80, 84, 85	9, 10, 12, 13
La Nereyda, 8 Wheat., 108, 168-9; 5 L. Ed., 574, 588	10
Mitchell v. Harmony, 13 How., 113; 14 L. Ed., 75	5
National Bolivian Nav. Co. v. Wilson, 5 App. Cases, 176, 196, 200; 43 L. T. Rep. N. S., 60	8
O'Neill v. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789-91-92	4, 9, 14
Percy v. Stranahan, 205 U. S., 257, 265, 273; 51 L. Ed., 793	4
Planters Bank v. Union Bank, 21 L. Ed., 473; 16 Wall., 483; 83 U. S., 473	5
Smith v. Weguelin, L. R. 8 Eq., 198, 211-14; 38 L. J. Ch., 465; 20 L. T. Rep. N. S., 724; 17 Wkly. Rep., 904	8
The Alerta v. Moran, 9 Cranch, 359, 364; 3 L. Ed., 758, 759	10
The Divina Pastora, 4 Wheat., 52, 64; 4 L. Ed., 512, 515	9
The Estrella, 4 Wheat., 298, 307-9; 4 L. Ed., 574, 577	9
The Nuestra Senora de la Caridad, 4 Wheat., 497, 502; 4 L. Ed., 624, 625	9, 11
The Santissima Trinidad, 7 Wheat., 283, 348-355; 5 L. Ed., 454, 470-2	10
Underhill v. Hernandez, 168 U. S., 250, 253; 42 L. Ed., 456, 457, 458	4, 7, 15
U. S. v. David G. Cooke, 17 L. Ed., 866; 2 Wall., 258; 69 U. S., 866	5
Wilson v. Church, L. R. 13 Ch. Div. 1, 46-7, 54-5, 64	8

(25,171)

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 405.

EDUARDO RICAUD, L. C. BARLOW, AND CHARLES HICKERSON,
PLAINTIFFS IN ERROR,

vs.

THE AMERICAN METAL COMPANY, LIMITED.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF AMICI CURIAE.

In the progress of the revolution in Mexico during the past four years, numerous seizures or confiscations of personal property in Mexico by one or the other of the parties engaged in the revolution have taken place. They are generally made as the result of a requisition or contribution, that is, a certain sum is levied sometimes only upon partisans of the opposing cause, sometimes, we believe, upon all residents alike, and upon failure of any person to pay his

share of the contribution, a portion of his property is seized and sold to pay such share.

Of the seizures so made in the northern states of Mexico, and especially in Chihuahua, Coahuila and Durango, perhaps the bulk of the property has found its way into the United States, the sales being generally made near the border. The original owners of the property so sold, in most cases Mexican citizens, have often followed the property into this country and have attempted to reclaim it in our courts. Consequently a considerable volume of litigation has resulted, one case having reached the Supreme Court of Errors and Appeals of New Jersey (O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789), and a number of other cases being still pending, not only in the border states, but, for example, in the Federal Courts of Colorado and Kansas. It is because of the importance of this present case as a precedent and because of their interest in some of the other cases pending that counsel who have signed this brief have asked leave to express their views upon the questions involved as *Amici Curiae.*

In the case at bar, as will be seen from the Certificate of the Court of Appeals, the military authorities of the army of Mexico, that is, of the Carranza or Constitutionalist forces, made a levy upon a Mexican mining company, the Penoles Mining Co., for the bullion in controversy. The bullion was sold and the purchaser shipped it into the United States at the port of entry, El Paso. While the bullion was still in the warehouse, the plaintiff, a corporation of the United States, claiming title to the bullion, started this action for an injunction restraining the

removal of the bullion. While the certificate does not show the nature of the plaintiff's claim to the bullion, the record in this case, which we understand is before this court, shows that the plaintiff claimed title under a bill of sale from the Mexican mining company, dated before the confiscation of the bullion by Mexican authorities.

It will thus be seen that the property was confiscated by the Constitutionalist military authorities as the property of a Mexican citizen and that there is at this time a question as to whom the property belonged at the time of the confiscation, that is, whether to the Mexican Company or to the American Company. It is apparently contended that if the property belonged to an American citizen at the time of its seizure by Mexican authorities that fact may give the court some additional reason for entertaining this action.

Without attempting to give a complete outline of the Mexican revolution, it is enough to say that in February, 1913, Victoriano Huerta revolted against the Madero government; that on February 20th, Venustiano Carranza, Governor of the State of Coahuila, under Madero, refused to recognize Huerta, and took the leadership of the counter-revolution; that on February 23rd, Francisco Madero was assassinated; that the government of the United States refused at all times to recognize Huerta, but on the contrary, on October 19th, 1915, recognized the Constitutionalist party as the *de facto* government of Mexico and Carranza as the Chief Executive of the *de facto* government; that later Carranza was elected President by the votes of the Mexican people, and that the government of the United States has ac-

corded him full diplomatic recognition as such President.

A resume of the position taken by the United States government prior to its recognition of the Carranza government is given in:

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789-91.

This court will take judicial notice of such facts as are recited above.

Underhill vs. Hernandez, 168 U. S., 250, 253; 42 L. Ed., 456, 458.

Jones vs. United States, 137 U. S., 302; 34 L. Ed., 691.

Upon questions which are political and not judicial, the courts follow the determination of the legislative or the executive branch of the government.

Jones vs. United States, 137 U. S., 302; 34 L. Ed., 691.

Percy vs. Stranahan, 205 U. S., 257, 265, 273; 51 L. Ed., 793.

It is important to remember that the entire transaction embraced in the present case took place within the Republic of Mexico. The property was in that Republic at the time it was seized and it was there sold by the government, and was afterwards shipped by the purchaser to the United States.

It seems evident, therefore, that the questions in this case are governed by International law and not by Military law. In other words, there are a large

number of cases which were cited in the Circuit Court of Appeals which can have no application to this case, such, for instance, as the following:

Mitchell vs. Harmony, 13 How., 113; 14 L. Ed., 75.

Planters Bank vs. Union Bank, 21 L. Ed., 473; 16 Wall., 483; 83 U. S., 473.

U. S. vs. David G. Cooke, 17 L. Ed., 866; 2 Wall., 258; 69 U. S., 866.

together with cases from other Federal Courts and some Kentucky cases. Moreover, the Fifth Amendment to the Constitution of the United States is cited in argument.

The principles laid down in the above authorities and which are, of course, familiar to this court, are sustained by a long course of decisions in which this court has laid down certain rules as to the circumstances under which the troops of the United States are justified in seizing property, both of citizens of the United States and of enemies, and under what circumstances the officers who seize such property will be personally liable. Under the Constitution of the United States and under the policy declared by this court, that in this country military power is always subordinate to the Civil, and always subject to inquiry by the courts, a strict rule of liability and accountability has been laid down as governing our soldiers, both in times of war and times of peace.

It will, however, serve no useful purpose to examine these cases in order to determine under what circumstances this court has held that the United States troops may confiscate or take possession of

property, or in what cases the officers will be liable for exceeding their authority or in what cases the government will be compelled to make reparation for injuries done by the troops, since obviously these principles cannot govern in this case. These are principles laid down by this court for the government of the soldiers of this country.

If the Supreme Court of the Republic of Mexico were passing upon the act of the Commander who confiscated this bullion, it might follow the same rules of liability which have been laid down by this court or it might not. It might inquire, as this court would probably do in the case of an American Commander, into all the circumstances of the taking in order to decide whether the Commander was justified or not justified. On the other hand, it might decide that the declaration of martial law in Mexico and the suspension of all constitutional guarantees had made the military power the supreme power in the land for the time being and had relieved it from the necessity of accounting to the civil courts.

We are not sufficiently familiar with Mexican law to know what course would probably be adopted by the courts of that country.

The question before this court, however, is how far the courts of the United States can inquire into the transactions of the military authorities of the Republic of Mexico in regard to acts committed within the Republic of Mexico and in regard to property which it is claimed on the one side was at the time of seizure, the property of an American citizen, and on the other side, the property of a Mexican citizen. The principles which should govern the decision of this question have been often announced by

this court. Probably the two most striking cases are the following:

Underhill vs. Hernandez, 168 U. S., 250; 42 L. Ed., 456.

American Banana Company vs. United Fruit Co., 213 U. S., 347; 53 L. Ed., 826.

The first of these cases laid down the doctrine that the acts of a foreign government within its own territory could not be brought into judgment in the courts of this country and consequently the court refused to review the acts of Hernandez, leader of the revolutionary party in Venezuela, in compelling the plaintiff, an American citizen, to remain in the city of Bolivar to operate the waterworks and certain repair works for the benefit of the revolutionary party. It will be noticed that that case was strikingly similar to the case at bar in two respects at least:

1st. That the acts complained of were done by the head of the revolutionary party, which party was afterwards recognized by the government of the United States; and

2nd. That the person complaining was an American citizen.

In the case of the American Banana Co. vs. United Fruit Co., this doctrine was carried much farther following strictly the logic of the Underhill case. In the later case the American Banana Company pleaded a conspiracy on the part of the United Fruit Co. to drive the plaintiff out of business in Panama by the aid of the government of Costa Rica. It was argued for the plaintiff that the doctrine of

the Underhill case extended only to cases where the suit was directed against the foreign power itself or against an officer acting within its territory and under its commands. This court, however, rejected the limitation and refused to pass, even indirectly in a suit between two American citizens, upon the validity of acts done by the Costa Rican government.

The courts of England have also many times refused to entertain a suit, even between their own citizens, where the acts of a foreign government were called in question. Thus the right of a foreign government to grant inconsistent concessions to two British citizens or the right of a foreign government to grant a concession to a British citizen and then to withdraw it, or the legality of such withdrawal, cannot be inquired into by English courts. This has been held both where the action was entirely between British subjects and even in a case where the foreign power whose acts were attempted to be called in question, was actually a party to the suit, appearing of its own volition in the English courts.

National Bolivian Nav. Co. vs. Wilson, 5 App. Cases, 176, 196, 200; 43 L. T. Rep. N. S., 60.

Gladstone vs. Ottoman Bank, 1 Hemming & Miller, 505, 509-13; 9 Jur. N. S., 246; 32 N. J. Ch., 228; 8 L. T. Rep. N. S., 162; 1 New Rep., 512; 11 Wkly. Rep., 460.

Smith vs. Weguelin, L. R. 8 Eq., 198, 211-14; 38 L. J. Ch., 465; 20 L. T. Rep. N. S., 724; 17 Wkly. Rep., 904.

Wilson vs. Church, L. R. 13 Ch. Div. 1, 46-7, 54-5, 64.

We also call attention to the only case in the state courts of last resort that we have been able to find where this question has been considered:

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789.

The same principle has been applied by this court in admiralty cases and particularly in Prize Cases. It will be remembered that Justice Holmes remarked in the American Banana case that for certain purposes the high seas are within the jurisdiction of all nations (213 U. S., 355-6). Nevertheless, in regard to the capture of vessels upon the high seas, this court has laid down the doctrine in a long series of cases that the "exclusive cognizance of Prize Questions belongs to the courts of the capturing power" and that "unless the neutral rights of the United States as ascertained by the laws of nations, the acts of Congress, and treaties with foreign powers, are violated by the cruisers sailing under commissions from those governments, captures by them are to be regarded by us as other captures, *jure belli*, are regarded; the legality of which cannot be determined in the courts of a neutral country."

The Divina Pastora, 4 Wheat., 52, 64; 4 L. Ed., 512, 515.

L'Invincible, 1 Wheat., 238, 254; 4 L. Ed., 80, 84.

The Estrella, 4 Wheat., 298, 307-9; 4 L. Ed., 574, 577.

The Nuestra Senora de la Caridad, 4 Wheat., 497; 4 L. Ed., 624.

The Alerta vs. Moran, 9 Cranch, 359, 364; 3 L. Ed., 758, 759.

The Santissima Trinidad, 7 Wheat., 283, 348-355; 5 L. Ed., 454, 470-2.

La Nereyda, 8 Wheat., 108, 168-9; 5 L. Ed., 574, 588.

L'Amistad de Rues, 5 Wheat., 385, 390-2; 5 L. Ed., 115.

Collins vs. Steamer Florida, 101 U. S., 37; 25 L. Ed., 898.

In the latest expression of this court in a case arising from the present war, the court reaffirmed the doctrine of the cases above cited, saying "the violation of neutrality is the basis of jurisdiction."

Berg vs. British & African Steam Nav. Co., U. S. Supreme Court Advance Opinions, 1916, No. 11, May 1st, 1917, p. 337 at page 343.

According to these same principles the fact that the captured vessel, or any captured property, is brought within the jurisdiction of the United States court cannot alone operate to give jurisdiction in this class of cases and this, in spite of the fact that Admiralty courts have a jurisdiction in rem perhaps more extensive than that of any other court.

Thus, as was said by Justice Johnson in one of the first cases, "under this view of the law of nations on this subject, it is evident that it becomes immaterial whether the *corpus* continue *sub potestate* of the capturing power or not."

L'Invincible, 1 Wheat., 238, 256; 4 L. Ed., 80, 85.

Therefore, the mere fact of the property being brought within the jurisdiction of the courts of this country does not give jurisdiction unless jurisdiction is conferred by a breach of our neutrality.

The Nuestra Senora de la Caridad, 4 Wheat., 497, 502; 4 L. Ed., 624, 625.

Collins vs. The Steamer Florida, 101 U. S., 37; 25 L. Ed., 898.

Berg vs. British and African Steam Nav. Co., U. S. Advance Opinions, 1916, No. 11, 337, 343.

As will be seen from all the cases upon this subject which we have cited, the basis of jurisdiction is the violation of neutrality. Of course, the presence of the property within American jurisdiction is necessary for a decree of restitution. In the absence of the property it is probable that the court might render a pecuniary judgment against the party in the case of violation of neutrality, as was said by Justice Story in the case of

L'Amistad de Rues, 5 Wheat., 385, 390,

but it is the violation of neutrality which gives jurisdiction and not the presence of the property within the jurisdiction of the court.

It cannot be contended in this case, where the acts were done wholly within the Republic of Mexico, that there was any violation of the neutrality of the United States so as to give this court any right to return the property to the person from whom it was taken by the Mexican government, whether that person be the Mexican corporation or the American cor-

poration. It has been held in these Prize Cases that the neutral court in the absence of violation of neutrality may inquire only whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power. This, of course, is to afford protection from piratical capture.

L'Invincible, 1 Wheat., 238, 258; 4 L. Ed., 80, 85.

The court cannot inquire whether the capture was made regularly or in accordance with the rules of war, these being questions which, as shown by the authorities cited above, are left to the courts of the captor. As Justice Story said, speaking of the rights of belligerents:

> "Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of judicial complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own government exclusively, for any excess or irregularity in their proceedings; and a neutral nation ought not otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction."

Justice Story then points out that any other course would compel the courts of a neutral nation

to pass upon questions between belligerents without possessing adequate means of ascertaining the real facts or of compelling the attendance of foreign witnesses, and that such a course would "very soon embark neutral nations in all the controversies and hostilities of the conflicting parties."

L'Amistad de Rues, 5 Wheat., 385, 390-91; 5 L. Ed., 115, 116-17.

As Justice Johnson has pointed out in a case previously cited, the remedy of a neutral whose property has been unjustly taken from him by a foreign power is to apply for relief in the courts of that power and if he does not receive justice, to secure redress through his own nation, that is, through diplomatic channels.

L'Invincible, 1 Wheat., 238, 250-67; 4 L. Ed., 80, 85.

It is true that in the New Jersey case above cited, it is said that while the right to levy contributions and to seize property is undoubted, citing a number of cases by this court to that effect, yet this right must be exercised in accordance with the rules of war. What the court means by this, however, appears to be only that it must be exercised by order of responsible authority and must not be mere brigandage or looting. Moreover, it must be remembered that in that case the opinion was rendered before recognition of the Carranza government by the United States and the court was not discussing the acts of a recog-

nized government but simply the acts of belligerents who had not been recognized as a lawful government.

O'Neill vs. Central Leather Co., 87 N. J. L., 552; 94 Atl., 789, 791-2.

We have found no authority which would justify the courts of a neutral nation in deciding whether or not the armies of another nation were justified in taking property by the necessity of the army or for any other reason, as it is sought to have the court determine in this case. Indeed such a procedure will be in direct conflict with the cases in this court which we have cited. Our courts, as we have said before, are authorized to inquire into all these matters when they are dealing with the acts of their own soldiers but not when they are dealing with the acts of a foreign government, whether it be the military or civil arm of that government.

We contend, therefore, that the true rule of the decision of this case should be that when it was once established that the property was taken by authority of the Mexican government, the jurisdiction of the court ceased and no relief could be awarded the complainant even though it be a citizen of the United States. The complainant's remedy lies either in the courts of Mexico or through the diplomatic channels of the United States. If the property at the time of the taking belonged to a Mexican corporation, still less can any relief be granted it in these courts. The question then is one purely between the Mexican citizen and his own government.

It is true that in this case the lower court had, as we understand, proceeded to judgment before the

recognition of the Carranza government by the United States but such recognition is retroactive and all of the acts of such government from the commencement of its existence are validated as the acts of an independent nation.

Underhill vs. Hernandez, 168 U. S., 250, 253; 42 L. Ed., 456, 457.

As an appeal was taken from this judgment, however, pending which appeal the recognition of the Carranza government took place, we contend that it became the duty of the Circuit Court of Appeals, if satisfied from the evidence that the property was taken by authority of the Carranza government, to dismiss the case, or if the evidence on this question was not clear, to remand the case to the lower court with proper directions.

Respectfully submitted,

CHARLES D. HAYT,
CLYDE C. DAWSON,
FRED R. WRIGHT,
Amici Curiae.